RICHARD WHITTAKER ET AL.

IBLA 74-206 Decided June 18, 1974

Appeal from a decision of the Townsite Trustee, Bureau of Land Management, Anchorage, Alaska, rejecting application for a trustee deed.

Affirmed.

Alaska: Townsite

An application for a deed to a lot in an Alaskan townsite is properly rejected where the applicant was neither an occupant, nor entitled to occupy the lot on the date of the approval of the final subdivisional townsite survey.

Words and Phrases

"Disinterested witnesses." As used in Alaska Townlot Deed Application Form 2242-2, the term "disinterested witnesses" refers to a person who has no interest in the tract applied for and who is not related to the applicant. Employees of a city are not, by the fact of their employment, prevented from being "disinterested witnesses" for a townlot application made on behalf of the city.

APPEARANCES: Richard Whittaker, Esq., pro se; Edward A. Stahla, Esq., City Attorney, Ketchikan, Alaska, for appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Richard Whittaker has appealed 1/ from a decision dated

1/ The appeal names as appellants: Richard, Judith, Jedediah, Jetta, Joshua, Juno, Jake and Jonah Whittaker.

January 16, 1974, whereby the Townsite Trustee, Bureau of Land Management, Anchorage, Alaska, rejected his application for a trustee deed to Tract F, U.S. Survey No. 437, Townsite of Ketchikan. In the decision, the Trustee stated that from his personal examination of the tract it was evident that the only improvement on Tract F is a 3-story concrete building known as "Main School", and that he found no evidence of recent attempts to improve this property. The decision stated that the City of Ketchikan has also filed an application for a trustee deed to Tract F and briefly noted the chain of title allegedly vesting title to the "Main School" in the City of Ketchikan. Based on the regulatory requirements that a trustee deed be issued to the owner of the improvement on the date of approval of the plat of survey of the townsite lot, in this case August 14, 1974, the Trustee rejected the application of Whittaker and announced that a trustee deed to Tract F will be issued to the City of Ketchikan.

The appellant contends that the application of the City of Ketchikan was not properly made in that there was no "statement of two disinterested witnesses," that the Townsite Trustee issued his decision before appellant had reasonable time to comment on the application by the City of Ketchikan, that the chain of title of the City of Ketchikan is defective for the reason that it does not show abandonment and reentry, that the Trustee's decision is defective because the Trustee did not seek information from the appellant as to appellant's entry, posting and use of the land, that the City of Ketchikan did not assert ownership of the building on Tract F in its application. The City of Ketchikan filed an answer to the appellant's brief, arguing in support of the Trustee's decision.

The statutory authority for non-native townsites in Alaska arises from section 11, Act of March 3, 1891, 26 Stat. 1095, 43 U.S.C. § 732 (1970) [formerly 48 U.S.C. § 355 (1964)].

Implementing regulations issued by the Secretary of the Interior on August 1, 1904, 33 L.D. 163, provided, inter alia, for survey of the townsite, including the establishment of lots and blocks, and the elimination and exclusion from the surveyed area of lands reserved for school purposes. Pursuant to these regulations, survey of the Ketchikan Townsite was made and a plat thereof, U.S. Survey No. 437, Alaska, was approved April 22, 1909. The plat shows an exclusion of 0.65 acre for the "School House Reserve" on Grant Street. The lotted lands within the townsite were disposed of according to law.

Pursuant to an application by the Townsite Trustee, a supplemental plat of U.S. Survey No. 437, Alaska, was prepared, designating

the land formerly known as "School House Reserve" as Tract F, 0.65 acre. The plat was approved August 14, 1973.

On September 10, 1973, a notice was posted on the said Tract F by the Townsite Trustee, stating that he had filed application AA 8486 to make final proof for the several use and benefit of the occupants of the Ketchikan Townsite Addition shown on the plat of U.S. Survey No. 437 Supplemental. In due course, final proof was made and land patent 50-74-0050 was issued November 28, 1973, to George E. M. Gustafson, Trustee, for Tract F, Supplemental Plat of U.S. Survey No. 437, Ketchikan Townsite, Alaska, 0.65 acre.

After approval of the Supplemental Plat, but before the land patent issued to the Townsite Trustee, the City of Ketchikan, on August 31, 1973, submitted its application for a deed to the former "School House Reserve."

Following issuance of the land patent, the Trustee published in the Ketchikan Daily News for 5 weeks a notice of Lot Award, Ketchikan Townsite Addition, Supplemental Plat of U.S. Survey No. 437, stating that he would be in Ketchikan on January 8 and 9, 1974, for the purpose of accepting applications for the said Tract F and that only those who were occupants of Tract F on August 14, 1973, the date of acceptance of the supplemental plat of survey of their assigns, were entitled to the allotment. Applicants who were not occupants of Tract F on August 14, 1973, would be required to substantiate their claim by proving a chain of title. Prospective applicants were directed to file applications with the Townsite Trustee, Bureau of Land Management, Anchorage, and to accompany each application by payment of $350, the assessment in full for the tract.

The application from the City of Ketchikan, filed August 31, 1973, was executed by James R. Eide, City Manager, with statements as disinterested witnesses from Margaret E. Moll and Mary McKinley. The application recited use and occupancy of Tract F since June 1903, arising from a deed dated June 1903 from one Victor Vigelius to the Public School of Ketchikan, with parenthetic comment that the City of Ketchikan was the only municipal entity in 1903 that could have provided schools. The property was designated "School House Reserve" on a 1913 plat by Charles E. Ingersoll, Townsite Trustee. The application further noted that the City of Ketchikan built a $1,500,000 building for the school in 1924. The City of Ketchikan conveyed the building by quitclaim deed executed December 7, 1955, to Ketchikan Independent School District, with reverter to the City of Ketchikan upon non-use for school purposes. Ketchikan Gateway Borough (successor in interest to Ketchikan Independent School District) executed a quitclaim deed to said property in favor of

the City of Ketchikan on August 6, 1973. The City of Ketchikan is presently maintaining and insuring said building. Said building is the only improvement claimed to be on the property.

The application from Richard Whittaker for and on behalf of himself and Judith, Jedediah, Jetta, Joshua, Juno, Jake and Jonah Whittaker, filed December 6, 1973, contained statements of disinterested witnesses from John S. Davies and Robert J. Kern. The application recites that the Whittakers have used and occupied the Tract from November 18, 1973. It states the tract has an abandoned school building, known as "Main School," of doubtful value and that the tract was used as a school until last year (1972), when the school district gave up the school use so the land would revert to the United States. Since abandonment, the school building has been vandalized.

Following his inspection of Tract F and based on the record information, the Trustee issued his decision rejecting Whittaker's application.

The regulation, 43 CFR 2565.3(c), in pertinent part, reads:

> Only those who were occupants of lots or entitled to such occupancy at the date of approval of final subdivisional town site survey or their assigns thereafter, are entitled to the allotments herein provided * * *.

The Whittaker application recites that use and occupancy commenced November 18, 1973. The supplemental plat of survey was approved August 14, 1973. On its face, therefore, the Whittaker application does not meet the requirement of the regulation. It was properly rejected.

The appeal of Whittaker is more a protest against acceptance by the Trustee of the prior filed application by the City of Ketchikan. We look now at the contentions of the appellant.

He charges that Mary McKinley and Margaret Moll are not disinterested witnesses because of their employment by the City of Ketchikan, as City Clerk and Assistant City Clerk, respectively, and whose work is under the direction of James Eide, City Manager. The City of Ketchikan replies that although Ms. McKinley is City Clerk, Ms. Moll is an employee of the Ketchikan Public Utilities, and in any event, neither is under direct supervision or control of the City Manager. The application, Form 2242-2, defines "disinterested witness" as "a person who has no interest in the tract and who is not related to the applicant."

In support of his thesis that the witnesses signed blindly and without personal knowledge, appellant adverts to the statement in the City's application that the City built a $1,500,000 building on the tract in 1924, whereas the supportive documents reflect a cost of only $150,000 for the school building. The $150,000 is fully supported by a preponderance of evidence in the record, much of it certified by Mary McKinley, City Clerk. It seems obvious that the $1,500,000 figure was strictly a typographical error only, not apprehended by either the signer or the witnesses, and was not a calculated action to mislead the Trustee. The argument of appellant is disingenuous.

Appellant complains that the Trustee acted precipitously in ruling in favor of the City of Ketchikan over his application. The regulation 43 CFR 2565.4(b)(1) provides that the Trustee may request a hearing in case of conflicting applications if he considers it necessary. Obviously the Trustee did not find merit in appellant's application and so he ruled in favor of the City. As stated above, appellant's application was not acceptable because his alleged use and occupancy was not initiated within the time period provided by the regulations. Further delay in issuing the Trustee's decision was not necessary.

Appellant talks about abandonment and reentry. Apparently appellant is laboring under some misapprehension that legal title to the "School House Reserve" was given by the United States to a predecessor of the City of Ketchikan, with right of reversion to the United States if the property ceased to be used for school purposes. The record shows that the "School House Reserve" was excluded from Ketchikan Town Site Survey, U.S. Survey No. 437, so that title to that parcel of land was never alienated from the United States. The tract was not enterable by anyone or disposable by the United States until properly surveyed. Such a survey is reflected by the U.S. Survey No. 437 Supplemental, approved August 14, 1973. The chain of title recited in the City's application relates only to the improvement (building) on the tract. There never has been a deed to this land from the United States until issuance of patent 50-74-0050 to the Townsite Trustee on November 28, 1973. The City's application is based upon its occupancy and use of the school building. 43 CFR 2565.3(c).

Appellant complains that the Trustee did not seek more information relative to his alleged use and occupancy of the tract. Where appellant's own statement shows the inception of his alleged occupancy several months after approval of the supplemental plat of survey, the Trustee had no reason to investigate further, especially in the face of an apparently valid earlier application from the City of Ketchikan for the tract, which was occupied by an erstwhile school building.

Appellant asserts that the improvements on the tract were the property of the United States on August 14, 1973, but has not provided any legal support for his argument.

The arguments of appellant are not convincing. The weight of the evidence supports the application of the City of Ketchikan, as the party which occupied the town lot on and before August 14, 1973. The Trustee correctly rejected the Whittaker application.

Appellee has requested a hearing on issues of fact. In view of our conclusions in the case, a hearing would serve no useful purpose. The motion for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Townsite Trustee is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Joseph W. Goss
Administrative Judge